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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 232.

BRONX BRASS FOUNDRY, INC.,
Petitioner,

against

IRVING TRUST COMPANY, as Trustee in Bankruptcy of J. R. PALMENBERG'S SONS, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

EDWARD F. UNGER,
Respondent's Counsel.

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Opinion Below.

There was no opinion in the District Court. The opinion of the Circuit Court of Appeals (R., 126-131) is reported in 76 Fed. (2d) 935.

Jurisdiction.

The order sought to be reviewed was entered on April 22nd, 1935 (R., 131). On July 9th, 1935, petitioner filed a petition for a writ of certiorari, invoking the jurisdiction of this Court under Section 240 (a) of the Judicial Code as amended.

Summary Statement of Matter Involved.

The order of the Circuit Court of Appeals affirmed the District Court's order affirming an order of the Referee in Bankruptcy which denied the application of the petitioner herein for leave to withdraw its claim against the bankrupt estate, and expunged the claim, unless, within twenty days there be paid to the trustee the sum of $1,000 and interest (R., 126-131).

The petition in bankruptcy was filed on July 18th, 1933 (R., 6, fol. 17). On September 25th, 1933, the creditor-petitioner herein filed its proof of claim against the bankrupt estate in the sum of $2,100 (R., 2), which as admitted by petitioner in its petition for a writ (R., 1), represents the balance remaining due on the original indebtedness of $3,100 after deducting $1,000 received on account. Petitioner herein admitted that the $1,000 claimed as a preference was received in several payments, by way of post-dated checks, within the four-month period prior to the adjudication in bankruptcy (R., 12, fol. 36).

On January 5th, 1934, the trustee filed objection to the claim upon the ground that the creditor had received a preference of $1,000 (R., 6-8). There were ten hearings upon the objection to this claim from February 2nd, 1934 (R., 11, fol. 31), until May 18th, 1934, when the application to discontinue was made (R., 76, fol. 228). The Referee denied the application to withdraw (R., 82, fol. 246). The petitioner withdrew from the hearing, but the respondent continued and completed its evidence in the case (R., 83, et seq.). The Referee finally entered an order expunging the claim unless $1,000 with interest was surrendered (R., 106). The District Court affirmed this order and dismissed the petition to review (R., 112). Upon appeal to the Circuit Court of Appeals, the order appealed from was affirmed (R., 131).

Questions Presented; Summary of Argument.

The petitioner contends that this appeal presents to this Court the following questions:

(A) Did the petitioner have the right to withdraw its proof of debt in this case after the objection by the trustee upon the ground that a preference had been received, and after the hearings upon the issue of preference had virtually been completed?

(B) Do the facts in this case indicate, as a matter of law, that no unlawful preference was received by petitioner herein?

Our argument will demonstrate that the Circuit Court of Appeals did not err and that the petition for a writ of certiorari should be denied.

I. The record below does not present any questions reviewable by this Court.

II. The Courts below properly exercised their discretion in denying petitioner's application to withdraw its proof of claim.

III. The record herein supports the finding that there was an unlawful preference.

POINT I.

The record below does not present any questions reviewable by this Court.

The following are the jurisdictional objections to the granting of the writ:

a. The order below is an affirmance of a default order entered by the Referee, and is not appealable.

b. This Court should not disturb the finding of preference upon the record herein.

c. This Court should not review the discretion of the Courts below in refusing to permit a withdrawal of the proof of claim.

a. *The Order Below Is An Affirmance of a Default Order Entered by the Referee and Is not Appealable.*

The petition admits, and the record establishes, that petitioner abandoned the proceeding despite the ruling of the Referee that no leave to discontinue would be granted (R., 82, 83, fols. 246-247). The proceedings continued and respondent offered testimony (R., 83, fols. 249, et seq.) in the absence of petitioner for the purpose of completing its proof. The order herein is therefore one on default. The law is clear that where a party defaults and an order or decree is entered thereupon, the defaulting party cannot question the insufficiency of testimony upon an appeal from the order entered on default, but it is necessary to make an application to vacate or modify the decree or order and to open up the default of the party.

An appeal may lie only from the order denying the application to vacate or modify the default decree or order.

Ohio Central Railway Co. v. *Central Trust Co.*, 133 U. S. 83;
Masterson v. *Howard*, 18 Wall. 99.

Whether or not the default is suffered before any testimony is taken by the other side or in the midst of the hearings should be of no consequence and the rule above stated is directly applicable to the instant case. It is there-

fore submitted that the petitioner's contention that the record does not establish a preference under the Bankruptcy Act cannot be considered upon this appeal. It is further submitted that the appellant cannot raise the question of the right to withdraw said claim upon this appeal.

b. *This Court Should Not Disturb the Finding of Preference Upon the Record Herein.*

The petitioner's contention that the decision of the Circuit Court of Appeals below is in conflict with that of other circuits is not correct upon this record. The Circuit Court of Appeals in its opinion stated that the evidence "is not altogether certain that, if the assets existing at the time of such payment had been applied to the payment of all the creditors, the Bronx Brass Foundry, Inc., would have received more than its pro rata share." The Court finally held that the petitioner herein had received an unlawful preference and that said fact was not to be determined by the situation that would have existed if the estate had been completely liquidated at the time of the transfer but upon whether the ultimate result of a payment by a known insolvent "will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class" (§60 (a) Bankruptcy Act).

It is submitted that the record contains substantial evidence to indicate not only insolvency but also that at the time of the transfer the *pro rata* share of the assets that would have been received by general creditors was much less than the monies received by the petitioner herein. The facts with respect to the issue of preference will be discussed hereafter (p. 8). These facts will substantiate the finding of preference upon the theory of all the cases and the Bankruptcy Act, and establish that this Court should not upset the order below on the weight of the evidence.

c. *This Court Should Not Review the Discretion of the Courts Below in Refusing to Permit a Withdrawal of the Proof of Claim.*

The respondent respectfully submits that considing all the facts in this case, the stage of proceedings, the legal prejudice to the trustee and creditors of the estate (see analysis of same hereafter, Point II), the Courts below properly exercised their discretion to deny leave to withdraw the claim. This Court should not assume jurisdiction to disturb such discretion of the lower Courts.

State of Alabama v. *United States,* 279 U. S. 229.

POINT II.

The Courts below properly exercised their discretion in denying petitioner's application to withdraw its proof of claim.

The petitioner's claim that the decision of the Circuit Court of Appeals below is in conflict with the case of *Scholl Manufacturing Co., Inc.,* v. *Rodgers,* 51 F. (2nd) 971 (C. C. A. 8th), is not correct. In the *Scholl Manufacturing Co.* case application for leave to withdraw the claim was made after the objections were filed by the trustee but prior to the time that any hearings were held upon the matter. It may be argued that a seasonable application to withdraw a claim should be granted as a matter of discretion because the prejudice to the trustee is not substantial. But the facts in the instant case justify the exercise of the discretion to deny leave to withdraw the claim.

The case of *Ex Parte Skinner & Eddy,* 265 U. S. 86 is not in conflict with the decision below since that case merely restates the general rule that a party has the right to

discontinue an action unless same would "prejudice the defendant in some other way than by the mere prospect of being harassed and vexed by future litigation of the *same kind.*" (Italics ours.)

In the instant case the trustee will be prejudiced in a manner other than by the prospect of being harassed by future litigation of the same kind. After a discontinuance is granted the trustee will have to institute a plenary action and try the case with full testimony. Certainly the Supreme Court does not refer to our situation. In the usual case where a counterclaim is interposed a discontinuance of the action might make necessary separate actions by the defendant and plaintiff. Yet the Supreme Court does hold that where a counterclaim has been interposed the necessity of an action by the defendant is prejudice warranting denial of leave to discontinue by the plaintiff (Pullman Palace Car Co. v. Central Transportation Co., 171 U. S. 138).

The Supreme Court is therefore obviously referring to the vexation by future litigation that would be instituted by the parties upon the same cause as the discontinued action; but where the discontinuance of an action makes necessary the institution of an action by the defendant and a full trial, along with a possible new action by the plaintiff on the discontinued case, then leave to discontinue may be denied as a matter of discretion. To permit the withdrawal of the claim would prejudice the trustee herein in a way other than the mere prospect of being harassed by the future filing of a claim by the petitioner-creditor herein. The trustee would be deprived of the affirmative right to obtain an adjudication that the $1,000 received by the petitioner-creditor herein was an unlawful preference. The opinion of the Circuit Court of Appeals very clearly presents the argument of the respondent in connection with this point (R., 128-129).

The petitioner's contention that a question is presented as to whether the District Court can enact a rule with

respect to discontinuances, is unsound. This Rule II of the Southern District (R., 129) is an *equity* rule which permits discontinuance, even in the absence of a counterclaim.

This record does not present this question of law to this Court, inasmuch as the Court below merely uses this rule as an analogy since the proceeding herein is one in *bankruptcy*. Moreover, the facts in the instant case indicate that the trustee herein is entitled to affirmative relief to the extent of obtaining an adjudication that the petitioner has received an unlawful preference. This rule specifically refers to cases where the defendant requests no affirmative relief.

POINT III.

The record herein substantially supports the finding that there was an unlawful preference.

The petitioner admits that it received $1,000 between April 24th and June 16th, 1934 (R., 12, fol. 36). In March, 1934, a meeting of the principal creditors of the bankrupt was called, at which petitioner and its attorney, Maxwell Goldstein, Esq., were present (R., 13, fol. 39; R., 31, fol. 92). The petitioner and its attorney were told that the bankrupt herein was insolvent (R., 14, fol. 40). The petitioner and its attorney refused to consent to an extension agreement of all creditors and the petitioner's attorney insisted that the petitioner's claim be purchased by creditors (R., 17, fol. 51). A statement of the condition of the company (Trustee's Exhibits 2 and 3, R., 95-97) was shown to the petitioner and its attorney (R., 39, fol. 117). An examination of this financial statement, particularly by petitioner's attorney, who is also an accountant (R., 37, fol. 128) clearly indicated that the bankrupt was hopelessly insolvent. The figure of "good will, pat-

ents and trademarks—$400,000''—had no value whatsoever and had been kept on the books for many years (R., 60, fols. 179-193). The petitioner was told and knew that the item of machinery and fixtures was of little value (R., 44, fol. 131; R., 35, fol. 134). The accounts receivable were in bad shape (R., 26, fol. 76). There were payroll and salaries due of over $7,500 and taxes of over $2,000, all of which were priority claims in case of liquidation, either under State or Federal practice (Trustee's Exhibits 2 and 3, R., 95-97). The petitioner knew that upon liquidation, only a nominal dividend would be paid (R., 43, fol. 129; R., 49, fol. 146). The petitioner knew and actually insisted upon receiving a preference inasmuch as it had not dealt with the bankrupt for as long a period as the other creditors (R., 34, fol. 102; R., 48, fol. 144).

It is therefore submitted that under any definition of unlawful preference, it is apparent that the petitioner received more than the *pro rata* share that would be received by creditors of the same class if a distribution had been made at the time the preference had been received.

It is submitted that the facts in this case warrant a holding of unlawful preference, even under the interpretation as set forth in the case of *Haas* v. *Sachs* (see petitioner's writ, p. 7).

In *Haas* v. *Sachs*, the evidence conclusively established that at the date of the hearing, the assets of the estate had been liquidated so as to award a dividend of 20% to creditors, whereas the money received by the creditor whose claim was objected to in said case was merely 10% of his claim.

In any event, it seems clear that where a creditors has received assets knowing of the debtor's insolvency *and then files a claim for the balance against the bankrupt estate,* that said creditor will receive a preference. This was illustrated by the Court in its opinion below (R., 130). No matter what the dividend may be, inasmuch as the assets heretofore received by the creditor with knowledge of

insolvency were applied as a 100% payment of part of the creditor's claim, receiving an equal dividend with other creditors upon the balance of the claim would result in a preference to said creditor. There may be a distinction and room for a different rule where the trustee brings an affirmative action to recover a preference and where no poof of claim has been filed. By failing to file a claim, that would be an indication that the assets received were taken in full satisfaction of said claim. Where no proof of claim is filed and an action is brought to recover a preference, the test might be made as to whether the assets received by the creditor in full satisfaction were larger than the *pro rata* share that said creditor would have received if the assets had been distributed at said time. But where a proof of claim is filed, as in the instant case, if the assets were received with knowledge of insolvency, the effect of approving said claim would be to permit said creditor to receive more than creditors of his class.

CONCLUSION.

The application for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD F. UNGER,
Respondent's Counsel.